

USDOL/OALJ Reporter

[*Bath v. U.S. Nuclear Regulatory Commission*](#), ARB No. 02-041, ALJ No. 2001-ERA-41
(ARB Sept. 29, 2003)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



ARB CASE NO. 02-041

ALJ CASE NO. 2001-ERA-41

DATE: September 29, 2003

In the Matter of:

**RONNEY L. BATH,
COMPLAINANT,**

v.

**U.S. NUCLEAR REGULATORY COMMISSION,
RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Billie Pirner Garde, Esq., Clifford, Lyons & Garde, Washington, D.C.

For the Respondent:

Donald F. Hassell, Esq., U.S. Nuclear Regulatory Commission, Washington, D.C.

FINAL DECISION AND ORDER

This case concerns Ronney L. Bath's complaint against the Nuclear Regulatory Commission (NRC) and five NRC employees alleging violations of the whistleblower protection provision of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 1995). Section 5851 prohibits employers from retaliating against employees who make safety complaints. The Administrative Law Judge (ALJ) granted the NRC's motion to dismiss the complaint for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). *Bath v. NRC*, ALJ No. 2001-ERA-41 (Jan. 18, 2002). Bath seeks review of that ruling. For the reasons that follow, we agree that the complaint must be dismissed.

We have jurisdiction to decide this matter pursuant to 29 C.F.R. § 24.8 (2002) and Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). We review an order to

dismiss for lack of jurisdiction de novo. *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-10 (ARB Jan. 31, 2001). In passing on a motion to dismiss, whether on grounds of lack of subject matter jurisdiction or failure to state a cause of action, we take the facts asserted in the complaint as true. *Cf. Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2, 92-CAA-5, 93-CAA-1, 94-CAA-2, 94-CAA-3, 95-ERA-1, slip op. at 58 (ARB June 14, 1996).

Bath alleges that U.S. Robotech, Inc. employed him from 1997 until his termination on December 22, 2000, that prior to his termination Robotech had assigned him to provide computer technology assistance to the NRC, and that while Bath worked at the NRC he discovered and reported what he believed to be safety lapses. Bath further asserts that five NRC employees pressured Robotech into firing him because of his reporting activity. This conduct, Bath asserts, violated § 5851 of the ERA. Bath seeks all available remedies, including money damages, against the NRC and its five employees. Amended Complaint of Retaliation, filed Oct. 10, 2001.¹

Pursuant to § 5851(b)(1), Bath submitted his allegations to the Occupational Safety and Health Administration (OSHA), the agency charged with investigating claims of § 5851 violations. OSHA determined that § 5851 did not apply to Bath's termination because the NRC and the named employees are not employers for purposes of § 5851. Bath appealed OSHA's determination, and the case was assigned to a Labor Department ALJ for a hearing.

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The NRC moved to dismiss Bath's Complaint. The NRC argued that neither it nor its employees are "employers" as defined by § 5851(a)(2).² Alternatively, NRC argued, the complaint is barred by sovereign immunity.

The ALJ's Recommended Decision

The ALJ granted NRC's motion to dismiss. He found that neither the NRC nor its individual employees were "employers" as defined by § 5851(a). Furthermore, he concluded that because Bath's claim against the individual employees concerned their official conduct, it was in effect a claim against the agency. He noted that claims against Federal agencies are barred by sovereign immunity absent clear waiver by Congress. Applying ARB precedent that Congress did not waive sovereign immunity against claims based on § 5851, the ALJ concluded that Bath's complaint against the NRC employees, as well as against the NRC itself, is barred. R. D. & O., slip op. at 2 - 5. Bath petitioned for review of the Recommended Decision and Order.

Discussion

On review, Bath challenges the ALJ's sovereign immunity determination. He contends that § 5851's legislative history includes statements by individual Congressmen that show

they assumed that NRC contract employees like Bath would be protected by § 5851 and, correspondingly, that NRC and its employees are employers of NRC contract employees. Bath also argued that because U.S. Robotech's contract with NRC required Robotech to comply with the Atomic Energy Act, Robotech was an employer under § 5851. Bath Initial Br. 6, 8.

After the parties filed their briefs with the Board, we issued a decision in which we held that a claim for money damages against a Federal agency based on § 5851 is barred by sovereign immunity. *Pastor v. Dep't of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-11 (ARB May 30, 2003). Departing from ARB precedent such as *Teles v. DOE*, No. 94-ERA-22 (Sec'y Aug. 7, 1995), *Pastor* held that legislative history is not a valid basis for inferring legislative intent to waive sovereign immunity. *Pastor*, slip op. at 6 ("A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text: 'the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text." *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 2097 (1996) (internal quotations omitted)). Because *Pastor* differed from prior ARB sovereign immunity decisions, we afforded the parties an opportunity to file supplemental briefs.

In his Supplemental Brief, Bath acknowledges that in *Pastor* the "ARB ruled that Congress did not waive sovereign immunity from monetary damages claims under the ERA" whistleblower protection provision at § 5851. Bath Supp. Br. at 2. We take this as a concession that Bath's claim for money damages against the NRC is no longer viable. In any event, concession or not, it is beyond question now that *Pastor* expressly invalidates Bath's legislative history argument for NRC liability.

With respect to his claims against individual NRC employees, however, Bath adheres to his argument that the ALJ erred in ruling that claims against the NRC employees are claims against the NRC and therefore barred by sovereign immunity. "[C]onsistent with the analysis in *Pastor v. Department of Veterans Affairs*, the NRC officials named individually as respondents in this case in their personal capacity are not protected from sovereign immunity from the claim asserted against them by Complainant." Supp. Br. at 1. We agree that the NRC's sovereign immunity does not bar a claim against its employees in their individual capacities. *Cf. Hafer v. Melo*, 502 U.S. 21, 27, 112 S.Ct. 358, 362 (1991) ("officers sued in their individual capacity come to court as individuals"). Nevertheless, Bath's complaint against the employees must be dismissed.

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The sine qua non of a § 5851 complaint is the employer-employee relationship. "No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" complained about covered safety hazards. 42 U.S.C.A. § 5851(a)(1). "Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or

in any other manner discriminates against any employee because the employee has" engaged in protected activity. 29 C.F.R. § 24.2(b) (2002). "Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) [which prohibits discrimination by an employer] may . . . file . . . a complaint. . . ." 42 U.S.C.A. § 5851(b)(1). See *Billings v. OFCCP*, No. 91-ERA-35, slip op. at 2 (Sec'y Sept. 24, 1991) ("It is well established that a necessary element of a valid ERA claim under Section 5851 is that the party charged with discrimination be an employer subject to the Act"); *Varnadore*, slip op. at 58 ("[P]ersons who are not 'employers' within the meaning given that word in the ERA may not be held liable for whistleblower violations").

Even if, as Bath alleges, NRC employees directed him in his work and influenced Robotech's decision to fire him, that would not make them employers in their own right. Employees are not employers within the meaning of § 5851 even if they are supervisory employees. *Kesterson v. Y-12 Nuclear Weapons Plant*, ALJ No. 95-CAA-0012, slip op. at 10 (Aug. 15, 1996), *affirmed*, ARB No. 96-173 (ARB Apr. 8, 1997) (dismissing § 5851 complaint against employees of employer because the complainant "failed to set forth any allegations that, even if taken as true and construed in the light most favorable to him, establish an employment relationship with these individuals rather than a mere supervisory relationship"). Bath's reliance on Robotech's contract with the NRC is misplaced. The contract cannot expand the scope of the statute.

Bath also argues that *Pastor* validates his complaint against the NRC employees in their individual capacity. "NRC employees are being sued individually, in their personal capacities. As such, they are not subject to sovereign immunity, and fall squarely within the meaning of 'person' in Section 5851(b) as analyzed in *Pastor*." Bath Supp. Br. at 2-3. This argument reflects a misunderstanding of *Pastor*.

Pastor considered the meaning of the term "person" in the context of sovereign immunity. The question in *Pastor* was whether a federal agency that is an employer within the meaning of § 5851(a)³ is immune from suit because Congress did not waive that agency's sovereign immunity. A basic requirement of sovereign immunity analysis is that it focus on the text that relates to liability. "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Pastor*, slip op. at 6. In § 5851, the text providing for monetary claims appears in subsection (b)(1), and it authorizes the Secretary of Labor to award money damages against "persons" found to have violated § 5851(a).

The term "person" carries special significance in the context of sovereign immunity because it is presumed to not include the federal government. "The word 'person' is a term of art used to exclude the federal government." *Pastor*, slip op. at 6. Congress' choice of the word "person" in the liability section of § 5851(b) was strong evidence that Congress did not intend to include federal agencies among the employers subject to liability under § 5851(b). For that reason, among others, the Board concluded that even though Congress included federal agencies and licensees in the definition of employer, it

did not waive the agencies' sovereign immunity from monetary claims allowed against non-governmental employers.

The sovereign immunity analysis in *Pastor* had no effect whatever on the fact that § 5851 does not apply to entities or individuals who are not employers. *Pastor* neither addressed nor cast any doubt upon the fact that § 5851 expressly connects the term "employer" in § 5851(a) and the term "person" in § 5851(b): "Any employee who believes that he has been discharged or otherwise discriminated against **by any person in violation of subsection (a) of [§ 5851]** . . . may . . . file a complaint with the Secretary of Labor. . . ." 42 U.S.C.A. § 5851(b)(1) (emphasis added). To the extent Bath believes that because *Pastor* focused on the term "person" it shifted § 5851 coverage from employers to any persons who affect employees' working conditions, he is simply mistaken.

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Conclusion

Bath's complaint against the NRC is dismissed because of sovereign immunity. Furthermore, inasmuch as NRC employees in their individual capacity are not employers covered by § 5851, we lack subject matter jurisdiction over Bath's complaint against them.

Accordingly, the Complaint against the NRC and the five individuals is dismissed.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[ENDNOTES]

¹ Bath's Complaint also named Robotech and its President as Respondents. Bath settled with Robotech and its President. Recommended Decision and Order Approving Settlement Agreement and Dismissing Complaint with Prejudice, ALJ No. 2001-ERA-40 (ALJ Jan. 24, 2002).

² For purposes of § 5851(a)(1) – "No employer may discharge . . . or otherwise discriminate against any employee. . . ." – the term employer includes licensees of the Nuclear Regulatory Commission, the licensees' contractors, applicants for such licenses, and contractors of the Department of Energy. 42 U.S.C.A. § 5851(a)(2).

³ The agency in *Pastor* was a Veterans Administration hospital which conceded that it was a covered employer because it was a licensee of the Nuclear Regulatory Commission within the meaning of § 5851(a)(2)(A).